In the Supreme Court of the United States.

OCTOBER TERM, 1904.

RAFAEL RODRIGUEZ AND EURIPIDES Rodriguez, plaintiffs in error, *v.* THE UNITED STATES. } No. 183.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiffs in error are brothers, and at the time of the commission of the offense of which they were subsequently convicted, conducted the post-office at Coamo, Porto Rico, one being postmaster and the other assistant postmaster. It appears that they were delinquent and trespassed against a postal regulation requiring them to remit all postal funds in their possession above a certain amount to San Juan, that being the Government depository for the island. The records of their office showed that they *should* have had on hand several hundred dollars in excess of the sum allowed, the inference being that they had used the money. The post-office at Coamo is between Salinas

and San Juan, so that a remittance from the Salinas office to the depository at San Juan would go through the Coamo office.

The assistant postmaster at Ponce testified (Rec., p. 60) that about the 1st of November, 1902, a young man who, to the best of his judgment, was Euripides Rodriguez, one of the defendants, inquired of him at the post-office in Ponce whether a party could purchase money orders at Salinas, and upon an affirmative answer being given, saw him take some blank applications from the table. The witness pointed out Euripides in the court room.

On November 1 a note in the following form, which the evidence tended to show was in the handwriting of Euripides, was handed to the postmaster at Salinas by a boy who delivered to the postmaster $700 in payment for the money orders called for in the note (Rec., p. 29):

SANTA YSABEL, *Nov. 1st, 1902.*

To the POSTMASTER AT SALINAS:

I was yesterday at Ponce, and the postmaster there told me that you could give me post-office orders for Coamo, so that I send you $700.00 in order that you may send them to me in post-office orders.

I also send you $2.10 for the payment of the orders

Respectfully,

F. LEON, *Agent.*

There was a bag containing $131 in silver, and the rest was in bills. This note was accompanied by seven

applications for money orders of $100 each. The following is a copy of one of the applications (Rec., p. 30):

[Stamp of Salinas P. O. dated Nov. 1, 1902.]

APPLICATION FOR MONEY ORDER.

$100.00. No. 90.

Amount: Cien dollars, —— cents.
Sent to P. R. Patron.
City or town: Coamo.
Street and No. ——.
State: ——.
Sent by F. Leon.
Address of sender ——.

The seven orders were duly made out in the following form and delivered to the boy:

UNITED STATES POSTAL MONEY ORDER.

No. 90.

SALINAS, PORTO RICO,
Noviembre 1, 1902.

To be stamped here.
(Coamo, P. R., Nov. 3, 1903.
M. O. B.)
by paying office
Pay to the order of P. R. Patron $100 dollars
—— cents.
One hundred dollars, —— cents.
To the postmaster at Coamo, P. R.
(Signed) GUILLERMA DE CINTRON,
Postmaster.
[Stamp] Salina, P. R., Nov. 1, 1902, M. O. B.
Received payment:
(Signed) P. R. PATRON.

On the day following, which was Sunday, the postmaster at Salinas prepared a letter of transmission, and put the silver in a small bag and the bills in an envelope furnished for that purpose, and sealed the same. The envelope was addressed "Postmaster, San Juan," as was also the package containing the silver. These were both given to the carrier Monday morning and both were traced intact to the Coamo office, where it is alleged the paper money disappeared. (Rec., pp. 31 and 32.) Soon thereafter the defendant, Rafael Rodriguez, remitted to San Juan the amount for which he was in arrears. (Rec., p. 62.)

At the January, 1903, term of the District Court of the United States for Porto Rico, an indictment was returned against the plaintiffs in error charging them with violating the laws of the United States while employed in its postal service. The first count charged a conspiracy to defraud the United States by stealing postal funds coming into the possession of Rafael Rodriguez as postmaster. The second count charged the defendants with theft and embezzlement. (Rec., pp. 1 and 2.)

January 24 defendants moved to quash the indictment upon the ground that the first count did not properly charge a conspiracy; that the second count failed to charge either a conspiracy or that defendant Euripides at the time of commission of alleged offense occupied any position of trust; and that the second count charged two distinct offenses, i. e., embezzlement and theft. (R., p. 7.)

January 26 defendants moved to quash the panel of petit jurors (R., p. 8), as follows:

> Now come defendants above named, by their attorneys, Dexter and Hord, and move the court to quash the panel of the jury this the January term, 1905, of this court, sitting at Ponce, for the reason that the names of the jurors composing the said panel—that is to say, the regular panel—were not publicly drawn from the box containing at the time when drawn the names of not less than three hundred persons possessing the qualities prescribed by section — of the Revised Statutes, which names shall have been placed therein by the clerk of this court and the jury commissioner thereof; but defendants state that the names contained in said jury box were not placed therein by the clerk and the said jury commissioner; the said clerk and the said commissioner did not place one name in said box alternately without reference to party affiliations until the whole number required were placed therein, but on the contrary defendants aver that the names from which said jurors composing the present panel of this court were drawn from said box were placed therein by the deputy clerk of this court and by the deputy marshal, John L. Miller, in the month of July, 1902; the said jury commissioner, Andres Crosas, was not present at the time and all of the names placed in said box and from which the present panel was drawn were placed therein all at one time by the said deputy clerk and the said deputy marshal, John L. Miller, after all of the names had been pre-

viously taken out from the said jury box and had been revised by the said deputy marshal, John L. Miller, and the said deputy clerk. And defendant prays that in support of this motion this court will hear the oral testimony of the said jury commissioner, Andres Crosas, John L Miller, and Frank Antonsanti, the last a deputy or assistant clerk in the office of the clerk of this court, all of which said persons have been duly subpœnaed to appear before this court for this purpose.

On the same day the following entry was made (R., 9):

> Now come the defendants herein and file motion to quash the regular panel of the petit jury at this term of court, and evidence being heard upon said motion it is overruled.

Evidence upon which this ruling was based, however, does not form a part of the bill of exceptions, and the defendants were not tried by the jury objected to, but before a jury composed of talesmen summoned from the bystanders (R., pp. 9–10); to which jury defendants did not object.

The case was called for trial on January 27 and on the 29th defendants were found guilty on the first count. (R., 10.) A sentence of two and three years, respectively, in the penitentiary was imposed on the same day and final commitment ordered. (R., 11, 12.) February 2 defendants moved in arrest of judgment, on the ground that the grand jury was not properly selected and drawn. (R., 12.) February 6, the motion in ar-

rest and a motion for new trial having been overruled (R., 14, 23), petition for an appeal to this court was granted and defendants admitted to bail. (R., 23.) The writ of error was allowed December 29, 1903. (R., 83.)

The act of Congress of April 12, 1900 (31 Stats., 77), provides:

> SEC. 35. That writs of error and appeals from the final decision of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States, and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought into question and the right claimed thereunder is denied.

ARGUMENT.

THIS COURT HAS NO JURISDICTION.

This court's power to review causes from Porto Rico is derived from section 35 of the act of April 12, 1900 (31 Stats., 85), set out above.

Under that part of the section giving appeals and writs of error in the same cases as from supreme courts of Territories, such cases as might have been reviewed under the act of March 3, 1885 (23 Stats., 443), when decided by the supreme court of a Territory, can now be reviewed when coming from Porto

Rico. (*Royal Insurance Company* v. *Martin* (192 U. S., 149.) But this court has repeatedly held that it has no jurisdiction in criminal cases from the Territories, unless it be to review the judgments of the trial courts in capital cases. (*Gonzales* v. *Cunningham*, 164 U. S., 617; *Amado* v. *United States*, 195 U. S., 172; *New* v. *Oklahoma*, 195 U. S., 252.)

Any jurisdiction, therefore, which might be claimed to exist in the present case, must be derived from that part of section 35, which provides:

> And such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied.

The Constitution was not brought in question and no right claimed under it was denied.

No treaty was in any way involved.

No act of Congress was "brought in question and the right claimed thereunder denied."

Obviously it is necessary, according to this language, that two distinct events occur, viz, an act of Congress must be brought in question and the right claimed thereunder denied. These two elements must unite. This is illustrated in the remarks of the court in *Snow* v. *United States* (118 U. S., 352), in speaking of acts of Congress similar to this. There is no such union in the present case in so far as objection is made to selection of petit jury. No act of Congress is brought in question in that connection. It was an

issue of fact, simply, and that issue was in effect determined in favor of the defendants. The word "and" signifies an addition to what has gone before. (*O'Brien* v. *Carson*, 42 Iowa, 554.) The conjunctive "and" is never construed to mean the same as the disjunctive "or," except for strong reasons, which do not exist in this case. The word is copulative, and words must be given their plain meaning unless a different intention is apparent. In other words, the language used, connected as it is by the conjunction "and," does not create two distinct grounds for appellate jurisdiction. On the contrary, there is a single ground, in the composition of which two elements are essential.

It has been held, for instance, that the obligation to "account for *and* pay over" moneys is but a single liability (*Supervisors* v. *Kirby*, 25 Wis., 498), and that the word "and" in the phrase "All persons in office at the time of the adoption of this constitution, *and* at the first election under it, shall hold their respective offices," etc., is used in a conjunctive sense. (*Commonwealth* v. *Kilgore*, 82 Pa. St., 396, 398.)

Other like instances are numerous. (*Washington* v. *Corinth*, 55 Vt., 468; *Jones* v. *Commonwealth*, 80 Va., 18, 20; *Leftwich* v. *Neal*, 7 W. Va., 569, 575; *United States* v. *Ten Cases of Shawls*, 2 Paine (U. S.), 162, 166; *Buck* v. *Danzenbacker*, 37 N. J. L., 361.)

A statute, then, must be brought in question. In the present case neither party properly questions the validity, interpretation, or constitutionality of any statute. Possibly there may be evidence of such an

objection as to composition of grand jury, but it came too late, as hereafter shown. This court, therefore, is without jurisdiction.

But even if the statutory provision should be interpreted in a disjunctive sense, still there is no jurisdiction, for the reason that no right was properly claimed under an act of Congress and denied.

1. *Overruling of motion to quash panel not such denial.*

TWELFTH ASSIGNMENT OF ERROR.

The action of the court in overruling the motion to quash the panel of petit jurors, on the ground that they were not properly selected and drawn, was not a denial of a right claimed under an act of Congress, for the following reasons:

(*a*) Objections to jurors not members of panel which tries defendant are of no avail. (*Burt* v. *Panjaud*, 99 U. S., 180.)

The summoning of talesmen from the bystanders under such conditions as existed here is proper. (R. S., sec. 804; *St. Clair* v. *United States*, 154 U. S., 134, 146; *Lovejoy* v. *United States*, 128 U. S., 171; *United States* v. *Eagan*, 30 Fed., 608; *United States* v. *Munford*, 16 Fed., 164; *United States* v. *Rose*, 6 Fed., 136.)

(*b*) Moreover, no objection was raised or exception taken to the jurymen before whom defendants were tried. Both are essential. (*Alexander* v. *United States*, 138 U. S., 353, 355.)

(*c*) The overruling of this motion was based upon evidence adduced before the court (R., p. 9) acting in

accordance with the provisions of section 216 of the Porto Rican Code of Criminal Procedure, which is as follows:

> If the challenge is denied, the denial may be oral, and must be entered on the minutes of the court, and the court must proceed to try the question of fact; and upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

(*d*) As the evidence in support of this motion forms no part of the bill of exceptions, and does not in any way appear in the record, the action of the court in the premises can not be reviewed here. (*Suydam* v. *Williamson*, 20 How., 427, 433; *Baltimore & P. R. R.* v. *Trustees*, 91 U. S., 127, 130; *Storm* v. *United States*, 94 U. S., 76, 81; *England* v. *Gebhardt*, 112 U. S., 502, 505; *Duncan* v. *Atchison, etc., R. R.*, 72 Fed., 808, 812; *State* v. *Henderson*, 109 Mo., 292; *State* v. *McClintock*, 37 Kans., 40; *State* v. *Smith*, 26 La. Ann., 62; *St. Louis, etc., Ry.* v. *Wheelis*, 72 Ill., 538; *Wiggins* v. *Witherington*, 96 Ala., 535.)

(*e*) There is nothing, therefore, to overcome the presumption that the jury was selected and drawn according to law, and that the clerk and jury commissioner performed their duties. (*United States Bank* v. *Dandridge*, 12 Wheat., 68; *Kie* v. *United States*, 27 Fed., 351; *United States* v. *Greene*, 113 Fed, 683, 693; *Osgood* v. *State*, 64 Wis., 472; *People* v. *Madison County*,

125 Ill., 334, 340; *Wheeler* v. *State*, 42 Ga., 306; *Smith* v. *State*, 88 Ala., 73; *Pauska* v. *Daus*, 31 Tex., 72; *Thompson and Merriam on Juries*, secs. 63, 586, and cases cited.)

(*f*) No exception was taken to the action of the court in overruling this motion. (*Alexander* v. *United States, supra.*)

2. *Overruling motion in arrest does not give jurisdiction.*

THIRTEENTH ASSIGNMENT OF ERROR.

The motion in arrest alleges the drawing of the grand jury contrary to law in that the jury commissioner acted with the deputy clerk instead of the clerk; that it was not shown they were of different political affiliation, and that the names were all placed in the box by the deputy clerk by order of the commissioner instead of alternately by the commissioner and clerk. In overruling the motion the court said (Rec., p. 14):

> The ground of this motion is that the grand jury that found the indictment was not drawn or selected according to law. It appears the regular jury commissioner, Andres Crosas, and the deputy clerk, Frank Antonsanti, acted in doing so, the clerk of the court being absent on sick leave. There is no charge of corruption, or that the selection was not by impartial persons. The general rule as to provisions of law for the selection of jurors is that they are only directory. There appear to have been some irregularities, and not an exact compliance with the terms of the statute; but both the commissioner, Crosas, and the deputy clerk made the

> selection, and both were present all the time during the selection, and no one else took part in it. It is not shown they are not of opposite politics, and this is to be presumed. There was no such material irregularity as vitiated the panel, but a substantial compliance with the statute upon the subject.

The overruling of this motion in arrest is not a denial of a right claimed under an act of Congress.

(*a*) It was not made until after defendants had pleaded not guilty to the indictment and had been tried, convicted, and sentenced. Such motions come too late if made after verdict.

Mr. Justice Bradley, delivering the opinion of the court in *United States* v. *Gale* (109 U. S., 65, 69), said:

> Much more would it seem to be requisite that all ordinary objections, based upon the disqualification of particular jurors, or upon informalities in summoning or empaneling the jury, where no statute makes proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity. It would be trifling with justice, and would render criminal proceedings a farce, if such objections could be taken after verdict, even though the irregularity should appear in the record of the proceedings.
>
> Wharton, Cr. Pl. and Prac., secs. 344, 350, 426.

In *Agnew* v. *United States* (165 U. S., 36) the defendant, by plea in abatement, objected to the manner of drawing the grand jury. The court, in passing on the question whether or not the plea was made in proper time, said:

> * * * One of these rules is that the defendant must take the first opportunity in his power to make the objection. * * * Another rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception. (*United States* v. *Richardson*, 28 Fed. Rep., 61; *United States* v. *Reed*, 2 Blatchford, 435, 456; *United States* v. *Tallman*, 10 Blatchford, 21, 51; *State* v. *Mellor*, 13 R. I., 666; *Cox* v. *People*, 80 N. Y., 500; *People* v. *Petrea*, 92 N. Y., 128)
>
> The original venire was issued November 18, the second venire issued December 2, 1895. The court opened December 3, 1895, and the indictment was returned December 12, yet defendant did not file his plea in abatement until December 17. The plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing "tended to his injury and prejudice," no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such (p. 44).

In the case of *Crowley* v. *United States* (194 U. S., 461, 472) the competency of individual jurors was challenged by plea in abatement. That case is clearly distinguishable from the one under consideration for the reason that in this case the competency of individual jurors is not attacked, and no prejudice to the defendants is alleged.

Mr. Justice Harlan, speaking for the court in the Crowley case, said:

> A leading case upon the question is *Vanhook* v. *State* (12 Texas, 252, 268). The court there said: "The better opinion to be deduced from the authorities to which we have access seems to be that irregularities in selecting and impanelling the grand jury, which do not relate to the competency of individual jurors, can, in general, only be objected by a challange to the array."

The following cases may also be cited:

> *State* v. *Swift*, 14 La. An., 827.
> *State* v. *White*, 35 La. An., 96.
> *State* v. *Jackson*, 36 La. An., 96.
> *People* v. *Ah Lee Doon*, 97 Cal., 171, 176.
> *Brown* v. *State*, 12 Ark., 623, 625.
> *Commonwealth* v. *Freeman*, 166 Pa. St., 332, 334.
> *Brill* v. *State*, 1 Tex. Apps., 572, 575.

(*b*) No exception was taken to the order of the court overruling the motion. (*Alexander* v. *United States*, *supra.*)

(c) Even if the facts were as stated in motions to quash panel and in arrest, action of the court in the premises was proper. (*United States* v. *Eagan*, 30 Fed., 608, 611; *United States* v. *Richardson*, 28 Fed., 61; *United States* v. *Ambrose*, 3 Fed., 283; *United States* v. *Tuska*, 14 Blatch. 5, Fed. Cas. No. 16550; *United States* v. *Greene*, 113 Fed., 683, 692; Wharton, Cr. Pl. and Prac., secs. 350, 388.)

3. *Overruling motion to quash indictment not such denial.*

FOURTEENTH ASSIGNMENT OF ERROR.

The overruling of the motion to quash the indictment did not deny defendants a right claimed under an act of Congress. It was alleged that the first count of the indictment did not properly charge a conspiracy to commit a crime against the laws of the United States. In *Amado* v. *United States* (*supra*), it was moved in arrest that the indictment did not set forth "an offense under the statutes of the United States," but this court said:

> That language amounted to nothing more, in legal effect, than a plea of not guilty, or a demurrer upon the general ground that the indictment did not state enough to show an offense. It was not the assertion of any particular right under the Constitution, or under any treaty, or under an act of Congress, which would be denied to him, if the prosecution was sustained. His contention was only that he was not subject to criminal prosecution by reason of anything set forth in the indictment.

The other objections raised in this connection are addressed to the second count. Defendants were convicted on the first count alone, and these matters therefore need not be considered.

In view of the general rule that indictments will only be quashed in very clear cases (Wharton, Cr. Pl. and Pr., sec. 386 and cases cited), the action of the lower court on these motions would seem above criticism.

Moreover, embezzlement and theft under this section may be charged in a single count. (*United States* v. *Golding*, 2 Cranch C. C., 212, Fed. Cas., No. 15224; *United States* v. *Byrne*, 44 Fed., 188.) The indictment was therefore proper as it stood, without treating the word "embezzlement" as surplusage.

4. *Objections relate to matters of form, cured by statute.*

The sole basis for all the motions was that the jurors were not drawn with such formality as defendants think demanded by the statute, and that the indictment did not properly set out an offense. Such objections relate to matters of form merely, and therefore come within section 1025, Revised Statutes, which provides:

> SEC. 1025. No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected

by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

United States v. *Molloy*, 31 Fed., 19, 23.
United States v. *Benson*, 31 Fed., 896.
United States v. *Ewan*, 40 Fed., 451.
Wolfson v. *United States*, 101 Fed., 430.

5. *No prejudice shown or alleged.*

It is not even contended that if true any of the matters objected to tended to prejudice the defendants, and the qualifications and unbiased character of the jurors are not impugned in the slightest degree. "Another general rule is that, for such irregularities as do not prejudice the defendant, he has no cause of complaint and can take no exception."

Agnew v. *United States*, 165 U. S., 36, 44, and cases cited.
Thompson and Merriam on Juries, sec. 276, and cases cited.
Wharton, Crim. Pl. and Pr., sec. 350.
Louisiana v. *Johnson*, 47 La. Ann., 1092.
United States v. *Tuska*, 14 Blatch., 5; Fed. Cas. No. 16550.

6. *Objections relate to extrinsic matters.*

Furthermore, motions in arrest or to quash raise only such objections as appear upon the face of the record. Extrinsic matters must be brought up by the plea in abatement. (*State* v. *Jackson*, 36 La. Ann., 96;

Wickwire v. *State*, 19 Conn., 477, 484; *United States* v. *Kilpatrick*, 16 Fed., 765, 773; *United States* v. *Pond*, 1 Curt. (U. S.), 265, Fed. Cas., No. 16067; *State* v. *Hensley*, 7 Blackf., 324; *Commonwealth* v. *Church*, 1 Pa. St., 105; *Commonwealth* v. *Donahue*, 126 Mass., 51; Thompson and Merriam on Juries, sec. 687, and cases cited; Wharton's Crim. Pl. and Pr., sec. 388, and cases cited.)

Thus, said the court in *Wickwire* v *State* (*supra*):

> It has never been the practice in this State for courts to entertain a motion, whether written or oral, in a criminal cause, to quash it, or erase it from the docket, except for defects apparent on the face of the proceedings; nor are we aware of any case in which such a motion has prevailed. Even in cases where the ground of the motion is apparent on the record, courts will exercise the power of quashing with great caution and only in very clear cases. But to do so where the facts are extrinsic would lead to irregularities in the proceedings, be attended with much practical inconvenience, and, especially in oral motions of this description, be altogether anomalous, inasmuch as the record would not disclose the ground on which the cause was disposed of nor furnish any future practical guide in similar cases.

In *State* v. *Jackson* (*supra*) the court used this language:

> It is equally well settled in criminal jurisprudence that "arrests of judgment arise from intrinsic causes appearing on the face of the record." * * * Criminal jurisprudence has

crystallized the rule that judgment will not be arrested on the ground of irregularities in the summoning of the jury or the composition of the grand jury.

For these reasons there was no lawful claim properly presented. To warrant the exercise of appellate jurisdiction, the right claimed must be such as the law recognizes. If it be not proved to be such claim, then there is not a "right claimed" within the meaning of this statute, and the court is without jurisdiction. That the word "claim" in a statute or deed contemplates lawful claims only is well established. (*Folliard* v. *Wallace*, 2 Johns (N. Y.), 395, 402; *Ludington* v. *Pulver*, 6 Wend (N. Y.), 404, 406; *Fellowes* v. *Clay*, 4 Q. B., 311, 319, 340.) Certainly the phrase in the statute, "right claimed thereunder," means something more than a mere pretense or assertion without any reasonable or substantial foundation. In any event, a mere demand or pretense is not sufficient, because a right must be claimed, and since nothing can be claimed which does not exist, and there was no such right, as we have already seen, ground for appellate jurisdiction has not been shown.

There is nothing else in the record which even approaches to a claim of right under an act of Congress The writ of error should therefore be dismissed for want of jurisdiction.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

These assignments raise objection to the admission in evidence (R., 29) of the letter purporting to have

been written by one Leon, without proof that either of defendants had written said letter or sent it to the postmaster. It was admitted upon the statement of the prosecution that he would afterwards connect it with defendants (R., 14), and evidence was subsequently introduced to show that the letter was written by one of the defendants. (R., 55, 60, 63.) That the order in which evidence shall be introduced lies entirely within the discretion of the trial court is too elementary to warrant discussion. The rule applies to proof of conspiracy. (*Taylor* v. *United States*, 89 Fed., 954; Enc. of Evidence, v. 3, p. 425, and cases cited.)

THIRD ASSIGNMENT OF ERROR.

By this assignment objection is made to ruling of court admitting in evidence (R., 29, 30) the seven applications for money orders, upon the ground that the connection of defendants with them was not established.

These applications for money orders were written by hand (R., 29), and there is evidence showing the handwriting of the defendants. (R., 55, 63, 69.) What better evidence could there be that a paper was written by a person than that it was in his handwriting? Such is the best evidence of which the case is susceptible. A sane man does not call in witnesses to his unlawful acts.

FOURTH ASSIGNMENT OF ERROR.

Error is charged in admitting as evidence the testimony of witnesses Boiseneau and McLeod as to conversations between them and defendant Rafael Rodriguez, because: (*a*) at time of its admission no conspiracy had been shown; (*b*) the conversations did not concern a conspiracy between defendants; (*c*) the conversations were with Rafael alone and should have been limited in effect to him.

(*a*) Evidence tending to show conspiracy was subsequently introduced. (R., 60.)

(*b*) and (*c*) As the conversations did not in any way bring in or mention the name of Euripides he was not thereby injured. (R., 52, 53.)

It appears on page 77 of record that defendants' counsel raised the point involved in this assignment in asking the judge to charge the jury "that the declaration of neither one of the defendants is to be taken against the other unless the jury believes a conspiracy has been established between them," and the judge so charged, defendants' counsel being satisfied with the charge on this point, as no objection was raised or exception taken.

FIFTH ASSIGNMENT OF ERROR.

The admission of the cash books kept by Rafael Rodriguez, as postmaster, is hereby challenged. (R., 55.)

Certainly these books were competent to show the handwriting of defendant, and if they are admissible for any purpose this admission is not error.

But they were admissible to show that there was sufficient money on hand at Coamo to permit the carrying out of the conspiracy in accordance with the theory of the prosecution.

The only objection at the trial was "irrelevant, incompetent, and immaterial," and nothing was said as to specific objection of prejudice raised here.

In the case of *Sparf and Hansen* v. *United States* (156 U. S., 51, 57), it was said:

> * * * It has, therefore, been often held that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered on error, if in any possible circumstances it could be deemed or could be made relevant, material, or competent.

SIXTH ASSIGNMENT OF ERROR.

The bill of exceptions contains no record of an objection or exception upon which to base this assignment. (R., 59, 62.)

SEVENTH ASSIGNMENT OF ERROR.

This objects to admission of testimony of witness Skinner that a person whom he believes to have been Euripides Rodriguez applied to him at the Ponce post-office to ascertain whether money orders could be purchased at the Salinas office (R., 60, 70, 71), because witness was not absolutely certain of identity of Euripides.

Such an objection relates only to the weight of the evidence, and does not affect its admissibility.

EIGHTH ASSIGNMENT OF ERROR.

That court erred in refusing to limit testimony of witnesses McLeod and Boiseneau to apply to defendant Rafael alone. (R., 52, 53, 63.) The conversation is itself limited to Rafael. It in no way refers to Euripides. Therefore, no such limitation by the court was necessary or proper.

NINTH ASSIGNMENT OF ERROR.

There is no error in refusing to admit in evidence an indictment against a witness for the purpose of impeaching his credibility. Whilst a witness may be discredited by showing his *conviction* for an offense, it is not competent to show that he has been indicted. The presumption of innocence prevails until conviction. (*Van Bokkelen* v. *Berdell*, 130 N. Y., 141, 145; *Anderson* v. *State*, 34 Ark., 257; *Canada* v. *Curry*, 73 Ind., 246, 249; *West* v. *Lynch*, 7 Daly (N. Y.)) 245.

This rule applies to indictments for perjury. (*Casey-Swasey Co.* v. *Va. St. Ins. Co.*, 75 So. W., 911; *Jackson* v. *Osborn*, 2 Wend. (N. Y.), 555, 558.)

Furthermore, evidence that he was under indictment and of the charge against him was admitted. (R., 45, 70.)

TENTH ASSIGNMENT OF ERROR.

Objection is made to that portion of the charge to the jury in which it is stated that there is evidence tending to show that an opportunity existed at Coamo for taking this money. (R., 76.)

Certainly there was a basis for this statement (R., 43, 45, 53), and the evidence on that point is not contradicted.

ELEVENTH ASSIGNMENT OF ERROR.

That part of the court's charge to the jury here criticised is obviously unobjectionable.

The matters covered by the twelfth, thirteenth, and fourteenth assignments have already been fully commented upon.

FIFTEENTH AND SIXTEENTH ASSIGNMENTS OF ERROR.

It is alleged that the ruling of the court that the word "embezzlement" in the indictment was surplusage, reduced the charges to theft and conspiracy to commit theft, and that, therefore, the court erred in admitting testimony showing that the money came into the hands of the defendants lawfully, and in refusing to instruct the jury that if the money came into the hands of defendants lawfully and in the course of their employment they should be found not guilty under the indictment.

Section 5467 of the Revised Statutes, which is not locally inapplicable and is therefore in force in Porto Rico (sec. 14, act of April 12, 1900, 31 Stats., 80), provides that:

> Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, * * * and which

> shall contain any note, bond, draft, check, warrant, * * * or other pecuniary obligation or security of the Government * * * of any description whatever, any bank note * * * any such person who shall *steal* or *take* any of the things aforesaid out of any letter, packet, bag, or mail of letters which *shall have come into his possession, either in the regular course of his official duties or in any other manner whatever*, * * * shall be punishable by imprisonment at hard labor for not less than one year nor more than five years.

Two classes of offenses were created by this section, one relating to embezzlement of letters, etc., and the other to stealing the contents. An indictment charging either offense is sufficient. (*United States* v. *Lacher*, 134 U. S., 624, 629; *United States* v. *Taylor*, 1 Hughes, 514, Fed. Cas. No. 16438; *United States* v. *Nott*, 1 McLean, 499, Fed. Cas. No. 15900; *United States* v. *Pelletreau*, 14 Blatch., 126, Fed. Cas. No. 16023.) The action of the court in the premises was therefore proper.

Under this section, as we have already seen, embezzlement and theft may be charged in a single count. (*United States* v. *Golding*, 2 Cranch C. C., 212, Fed. Cas. No. 15224; *United States* v. *Byrne*, 44 Fed., 188.) The court might have upheld the count without treating the word embezzlement as surplusage.

SEVENTEENTH ASSIGNMENT OF ERROR.

The verdict is hereby objected to as not being responsive to the issues and being silent as to the second count.

The court properly instructed the jury (R., 73) that defendants could be found guilty under one or both counts, or that under the second count they could find both or only one guilty.

Both were found guilty under the first count. (R., 10.)

There was evidence upon which to base a verdict of conspiracy. The letter written to the postmaster at Salinas was in evidence (R., 29); also the applications for money orders accompanying it. (R., 39.) The handwriting of both defendants was shown. (R., 55, 60.) Evidently the jury, after comparing the letter and applications with the standards thus established, were not at a loss for proof of conspiracy. There is other evidence connecting Euripides with the matter. (R., 60, 61, 70, 71.)

Furthermore, the court was not requested to instruct the jury that there was not evidence upon which to base a verdict of guilty on the count charging conspiracy. In the absence of such a request the presumption arises that there was sufficient evidence to warrant the trial court in submitting the consideration of the facts to the jury. (*Hansen* v. *Boyd*, 161 U. S., 397, 402; *Hartford Ins. Co.* v. *Unsell*, 144 U. S., 439.)

EIGHTEENTH ASSIGNMENT OF ERROR.

The objection to the first count here raised is sufficiently answered by saying that it charges conspiracy on the part of defendants. Both defendants need not have participated in the actual taking of the money.

NINETEENTH ASSIGNMENT OF ERROR.

This assignment is without merit and, moreover, not the subject of objection and exception at the trial.

TWENTIETH ASSIGNMENT OF ERROR.

This assignment alleges error in overruling motion for new trial and in refusing to permit defendants to contradict the testimony of the witness Jordan by newly discovered evidence.

The newly discovered evidence, according to the affidavits filed, simply tended to impeach the testimony of a witness by showing that he had made statements inconsistent therewith. It might have been competent if introduced at the trial and after a proper foundation had been laid, but a new trial will not be granted for such a purpose. (*United States* v. *Mulholland*, 50 Fed., 413, 419; *Lowry* v. *Mt. Adams, etc., Ry. Co.*, 68 Fed., 827, 829; *Carr* v. *Gale*, 1 Curt., 384, Fed. Cas. No. 2433.)

Overruling or granting of motion for new trial is discretionary with the trial court. In *Blitz* v. *United States* (153 U. S., 312) the court said:

We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial can not be reviewed upon writ of error.

The Government respectfully requests that the writ of error be dismissed, or that the judgment of the lower court be affirmed.

CHARLES H. ROBB,
Assistant Attorney-General.

GLENN E. HUSTED,
Assistant Attorney.

WASHINGTON, *March, 1905.*

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SUPREME COURT U. S.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

RAFAEL RODRIGUEZ AND EURIPIDES RODRIGUEZ, plaintiffs in error,
v.
THE UNITED STATES. } No. 183.

SUGGESTION RESPECTING PETITION FOR REHEARING.

It is respectfully suggested to the court that the case of *Crowley* v. *United States* (194 U. S., 461), to which counsel call attention, differs from the one at bar in that the objection to composition of the grand jury was there raised by a plea in abatement filed three days after the indictment, whereas in the present case the objection was not raised until after trial and conviction.

If, as counsel contend, the motion in arrest is in nature of demurrer, then by it objection can be taken to such errors only as are apparent upon the face of the record, and since nothing there appeared to give any basis whatever for an allegation of irregularity in the selecting and impaneling of the grand jury, the motion must have failed for that reason alone. The

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motions in arrest in cases cited all related to objections which appeared of record and therefore could have been taken advantage of without an exception.

Moreover, it is submitted that the better and general rule in State practice is that, to obtain a review of rulings or decisions made after trial or judgment, exceptions thereto are essential. (2 Cyc. L. & Proced., p. 732, and cases cited.) In the Federal courts exceptions are also taken to the overruling of motions in arrest in criminal cases. (*Barrett* v. *United States*, 169 U. S. 218, 219.)

Respectfully submitted.

CHARLES H. ROBB,
Assistant Attorney-General.

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